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3-10-08

No. 07-893

In the Supreme Court of the United States

JUAN ANGEL PANDO FRANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the admission of evidence that petitioner was silent after he was arrested but before he received *Miranda* warnings violated his Fifth Amendment privilege against compelled self-incrimination.

2. Whether petitioner validly waived any right he may have had not to have his post-arrest silence used against him by answering questions about that silence during a post-*Miranda*-warnings interview.

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-14a) is reported at 503 F.3d 389.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2007. The petition for a writ of certiorari was filed on January 2, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of importing marijuana, in violation of 21 U.S.C. 952; 21 U.S.C. 960 (2000 & Supp. V 2005) (Count 1), and possessing marijuana with the intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count 2). He was

sentenced to 27 months of imprisonment. The court of appeals affirmed.

1. a. On March 26, 2006, petitioner attempted to enter the United States from Mexico at the Presidio, Texas, Port of Entry. He was driving a Ford passenger van. He was referred to a secondary inspection area because he was transporting three additional passengers and pulling a trailer. While he and his passengers were undergoing passport examination and identification, Customs and Border Protection (CBP) Officers Alfredo Huerta and Ralph Gonzales inspected the van, the trailer, and their contents. Inside the trailer, they saw a wooden table, which they described as "being cheaply made out of plywood, with glue and nails coming out of it on the edge," and having edges that were "lumpier" than the rest of the table. Pet. App. 1a-2a. The officers testified that the table was shoddily made, "not the kind of table one would entertain guests on," with edges that appeared crooked, not flush, and overly heavy. *Ibid.* Using a density meter, however, Officer Gonzales discovered that the table had an abnormally high reading around its edges. The officers drilled a hole into a corner of the table and discovered 17.4 kilograms of marijuana inside. After petitioner claimed ownership of the table, he was handcuffed and taken to a holding area. A CBP agent later testified that petitioner was "calm, cooperative and quiet. He didn't say anything." *Ibid.*; Gov't C.A. Br. 21.

b. Approximately two hours later, petitioner was removed from the holding area and given the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). After signing a written waiver of his *Miranda* rights, petitioner was interviewed. He told the officers that he and his son were in the business of transporting people

and goods between Oklahoma and Julimes, Chihuahua, Mexico. Joining him on this particular trip were his nephew, Jose Ruiz, and two passengers. Petitioner stated that it cost him $200 to $250 to fuel up one way, but that he usually charges $100 per person and $50 per child. The officers pointed out that this particular trip was not cost-beneficial because petitioner was only transporting two individuals. Petitioner explained that he needed to return to Oklahoma regardless and that he usually makes up the difference by importing goods. Pet. App. 2a-3a.

Without any prompting from the officers, petitioner then stated, "that's where my mistake is, specifically agreeing to transport that table." Pet. App. 3a. He told the officers that he was supposed to deliver the table to a young man in Oklahoma City, but that he did not know the man. In his wallet, he had a piece of paper that he removed from the table that contained the man's name, address, and phone number. When asked why he removed the paper from the table, he first explained that the paper would help him find the person for whom he was importing the table, but later retracted that statement and said he removed the paper "to facilitate its importation through the port of entry." *Ibid.* Petitioner explained that he was initially contacted by cell phone about shipping the table, that it was dropped off at his mother's house, and that he was paid $40 to transport the table. He stated that he usually does not ship things for strangers, but that he liked this man's voice and felt comfortable with him. The man told petitioner that the table was a gift for a friend. Petitioner stated that although he always examines items before delivery, he did not examine the table. He noted, however, that he found

the table overly heavy and that it took both him and his nephew to load it into the trailer. *Ibid.*

2. At trial, one of the officers involved in the questioning of petitioner testified that during the interview of petitioner "[w]e pointed out to [petitioner] that, throughout the duration of the interview with him, not once had he bothered asking why he was being interviewed." Pet. App. 11a (emphases deleted). After an objection was overruled, the officer reiterated that "[w]e pointed out to [petitioner] that not once during the whole course of his detention—not once had he bothered to ask why he had been handcuffed, detained and was now being presently interviewed." *Ibid.* (emphasis deleted). In response, petitioner said he realized that the "table must contain drugs." *Id.* at 4a, 13a. When asked by the officers what type of drugs he was referring to, petitioner responded, "cocaine." *Id.* at 4a.

During closing argument, the prosecutor pointed to that testimony, stating as follows:

> If somebody goes to handcuff you, what is going to be your reaction? If you've got guilty knowledge, if you know you're committing an offense that's illegal, maybe it wouldn't bother you at all . . . . Why do you think he sat there very calmly and stayed quiet? Ladies and gentlemen, he knew exactly why he was being detained. He knew, whether it was marijuana or cocaine or heroin or stolen jewelry, whatever it was, it was in that table.

Pet. App. 5a. Petitioner objected, but the objection was overruled. *Ibid.*

3. On appeal, petitioner challenged the sufficiency of the evidence to support his convictions as well as the admission of the evidence of his post-arrest, pre-

Miranda silence. Pet. C.A. Br. 25-36. The court of appeals rejected those contentions and affirmed. Pet. App. 1a-14a.

a. The court initially concluded that the evidence was sufficient to support petitioner's convictions "[e]ven if we exclude the references to [petitioner's] post-arrest, pre- and post-*Miranda* silence." Pet. App. 8a. First, the court noted that petitioner "did not seem overly surprised or bothered by his detention and, without prompting, affirmatively stated to the officers that "the table must contain drugs." *Ibid.* Second, the court noted that the officers testified at trial that the table's shoddy construction and heavy weight were highly suspect. Third, petitioner gave conflicting statements about why he removed the piece of paper from the table, at one point stating that it was to facilitate its entrance into the United States. Finally, the jury could have easily found implausible petitioner's assertion that, although he never transports goods for strangers and always inspects goods before transportation, he failed to do so on this one particular occasion when the item being transported contained drugs. The court therefore concluded that "that the circumstantial evidence in this case is sufficient to support the jury's verdict." *Ibid.*

b. With regard to the prosecutor's use of petitioner's silence, the court noted, although the government had referred to and elicited testimony about petitioner's post-arrest silence, both and after *Miranda* warnings, the parties "focus[ed] solely on the Government's references to [petitioner's] post-arrest, pre-*Miranda* silence." Pet. App. 10a. The court noted that it had not previously addressed whether references to such silence as substantive evidence of guilt are consistent with the Fifth Amendment, *ibid.*, and it found no need to address

that issue in this case because each of the statements admitted at trial that allegedly referred to petitioner's "post-arrest, pre-*Miranda* silence" also included references to petitioner's "post-arrest, post-*Miranda* silence, which is squarely governed by *Miranda*." *Id.* at 12a.

The court noted that the Fifth Amendment's protection of the right to silence under *Miranda* "is subject to waiver provided the waiver is made voluntarily, knowingly and intelligently." Pet. App. 12a. Here, the court noted, petitioner did not dispute he had voluntarily waived his rights knowing his statements could be used against him. He also did not dispute that "during his interrogation he answered questions about" his silence after his arrest, both before and after *Miranda* warnings. *Id.* at 13a. The court held that his answers to those questions after waiving his *Miranda* rights permitted the government to introduce "the entire conversation, including the implicit references to his silence contained therein." *Ibid.* "In short, by knowingly, intelligently, and voluntarily waiving his *Miranda* rights and then answering questions about his silence, [petitioner] cannot be said to have been exercising his privilege against self-incrimination at that time." *Id.* at 13a-14a. In an accompanying footnote, the court emphasized that its holding was "a narrow one" that relied "exclusively" on the fact of petitioner's waiver and his subsequent decision to answer questions about his silence. *Id.* at 14a n.3. The court explicitly stated that it did "not address the issue of whether a *Miranda* waiver alone has any retroactive effect on the admissibility of post-arrest, pre-*Miranda* silence." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 6-14) that the government's introduction into evidence of his post-arrest, pre-*Miranda*-warning silence violated his Fifth Amendment privilege against compelled self-incrimination. Although there is some disagreement in the courts of appeals on whether the government may use a defendant's post-arrest, pre-warning silence as substantive evidence of guilt, this case presents an unsuitable vehicle for considering that issue. The court of appeals correctly recognized that this case turns on the admissibility of petitioner's post-*Miranda* responses to questions about his calm and uninquisitive reaction to being arrested. The court therefore found no need to resolve the issue of whether post-arrest prewarning silence can be introduced independently. Accordingly, further review is not warranted.[1]

a. In *Griffin* v. *California*, 380 U.S. 609, 615 (1965), this Court held that the Fifth Amendment prohibits the prosecution from commenting on the defendant's failure to testify at trial. As the Court later explained, *Griffin* held that "the defendant's right to hold the prosecution to proving its case without his assistance is not to be impaired by the jury's counting the defendant's silence at trial against him." *Portuondo* v. *Agard*, 529 U.S. 61, 67 (2000).

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court held that absent other safeguards to protect Fifth Amendment rights, the government may not introduce

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[1] This Court has previously denied petitions for a writ of certiorari raising the same conflict. See *Ledesma* v. *United States*, 127 S. Ct. 381 (2006) (No. 05-11325); *Portocarrero* v. *United States*, 127 S. Ct. 381 (2006) (No. 05-11409).

statements obtained during custodial interrogation as evidence of the defendant's guilt unless it has warned a suspect of his right to remain silent, his right to counsel, and of the fact that any statement made can be used against him at trial. In *Doyle* v. *Ohio*, 426 U.S. 610 (1976), the prosecutor sought to impeach the defendant's testimony at trial by eliciting evidence that the defendant had remained silent and had failed to provide the same story after receiving *Miranda* warnings following his arrest. The Court held that the prosecution's use of the defendant's post-warning silence as impeachment at trial was "fundamentally unfair and a deprivation of due process." *Id.* at 618. The due process violation arose, the Court explained, because *Miranda* warnings contain implicit assurances that a defendant's exercise of his "right to remain silent" will not carry with it a penalty. *Ibid.*

In *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), the Court held that the Fifth Amendment and the Due Process Clause do not prohibit the prosecution from impeaching a testifying defendant with his pre-custody, pre-*Miranda* silence. *Id.* at 238-239. The Court concluded that *Doyle*'s reasoning was inapposite because "no governmental action induced petitioner to remain silent." *Id.* at 240. In *Fletcher* v. *Weir*, 455 U.S. 603, 607 (1982) (per curiam), the Court applied that same analysis in a case involving impeachment with post-arrest, pre-*Miranda* silence. The Court explained that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Ibid.*; accord *Brecht* v. *Abrahamson*, 507 U.S. 619, 628 (1993) (*Doyle* line of

cases "rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial'") (quoting *Wainwright* v. *Greenfield*, 474 U.S. 284, 291 (1986)); *Greer* v. *Miller*, 483 U.S. 756, 763-764 (1987) (same).

The Court's decisions discussed above do not address the question whether the prosecution may present evidence of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt in the government's case-in-chief, and the courts of appeals have reached varying conclusions on that issue. The Fourth, Eighth, and Eleventh Circuits have held that the admission of such silence does not violate the Constitution. *United States* v. *Love*, 767 F.2d 1052, 1063 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986); *United States* v. *Frazier*, 408 F.3d 1102, 1109-1111 (8th Cir. 2005), cert. denied, 546 U.S. 1151 (2006); *United States* v. *Rivera*, 944 F.2d 1563, 1567-1568 (11th Cir. 1991). The Seventh, Ninth, and D.C. Circuits have held that such silence may not be admitted as substantive evidence of guilt. *United States* v. *Hernandez*, 948 F.2d 316, 322-324 (7th Cir. 1991); *United States* v. *Velarde-Gomez*, 269 F.3d 1023, 1028-1030 (9th Cir. 2001) (en banc); *United States* v. *Moore*, 104 F.3d 377, 384-389 (D.C. Cir. 1997). In *Moore* and *Hernandez*, the courts of appeals ultimately concluded that any Fifth Amendment error was harmless beyond a reasonable doubt. *Moore*, 104 F.3d at 389-390; *Hernandez*, 948 F.2d at 324-325. In *Velarde-Gomez*, the court found that the error was not harmless because the government "used the testimony about [defendant's] silence as its principal means of meeting its burden on the critical element of knowledge" and because the re-

maining evidence was "not so strong." 269 F.3d at 1034-1035.[2]

b. This case does not present an opportunity for resolving the disagreement in the circuits on whether the government may introduce evidence of a defendant's post-arrest, pre-warning silence in its case-in-chief. That is because the facts do not squarely raise that issue and the court of appeals did not resolve it. The agent in this case testified that, after petitioner waived his *Miranda* rights and agreed to speak, the agents confronted him with the fact that "not once during the whole course of his detention—not once had he bothered to ask why he had been handcuffed, detained and was being presently interviewed." Pet. C.A. Br. 28 (quoting 1 Tr. 96, 97). Petitioner responded by "point[ing] out that he

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[2] Petitioner also asserts (Pet. 8-10) that the First, Sixth, and Tenth Circuits also have held that pre-arrest, pre-warning silence is inadmissible as substantive evidence of guilt. See Pet. App. 11a n.1. That is not correct, as those cases generally involved circumstances in which the defendant had affirmatively asserted his right against compelled self-incrimination. In *United States* v. *Burson*, 952 F.2d 1196, 1200-1201 (10th Cir. 1991), cert. denied, 503 U.S. 997 (1992), the court held that the defendant, in a pre-arrest interview, had invoked his right to silence and that it was therefore "impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised." In *Coppola* v. *Powell*, 878 F.2d 1562, 1567 (1st Cir.), cert. denied, 493 U.S. 969 (1989), the court held that the defendant's pre-arrest statement invoked his privilege against compelled self-incrimination, and that the court therefore should not have admitted that statement. In *Combs* v. *Coyle*, 205 F.3d 269, 283-285 (6th Cir.), cert. denied, 531 U.S. 1035 (2000), the court held that the defendant's statement was a proper invocation of his Fifth Amendment right and that it was error to admit that statement as well as defendant's silence in its aftermath. Finally, the Second Circuit did not reach the issue in *United States* v. *Caro*, 637 F.2d 869, 876 (1981), but instead concluded that even if it assumed that a comment on defendant's silence was error, it was harmless.

realized there must be a problem with the table." *Ibid.*; see Pet. App. 4a (noting that petitioner replied that the "table must contain drugs"). The court of appeals reasoned that petitioner's post-arrest, pre-*Miranda* silence was admissible because the agents asked petitioner about it, and he responded, after waving his *Miranda* rights. The court explained that "by answering these questions after having knowingly received proper *Miranda* warnings," petitioner waived the right to preclude any part of his warned conversation with the agents. *Id.* at 13a. The court then correctly declined to address the question whether, absent such a post-*Miranda* interchange with the suspect about his pre-*Miranda* silence following his arrest, a suspect's post-arrest, pre-warning silence could be admitted. *Id.* at 12a ("we need not address the issue of whether the Fifth Amendment privilege against self-incrimination applies to post-arrest, pre-*Miranda* silence"). This Court need not resolve that issue either, because, in the context of this case, it is not squarely presented.[3]

Petitioner accordingly errs in suggesting (Pet. 14-15) that the court of appeals' decision conflicts with *Oregon* v. *Elstad*, 470 U.S. 298, 317-318 (1985). In *Elstad*, the Court held that statements voluntarily made after a suspect receives proper *Miranda* warnings and waives his rights are not per se inadmissible because the defendant

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[3] The government did elicit a reference to petitioner's silence after his arrest, and before *Miranda* warnings, through testimony about his calm, quiet disposition after arrest and before he was questioned. See Pet. C.A. Br. 27 (quoting 1 Tr. 62). But since an agent later testified that he confronted petitioner, in the post-*Miranda* questioning, with his uninquisitive behavior after arrest and throughout the entire interview, Pet. App. 11a, the earlier reference added nothing of substance to the evidence against petitioner.

previously made voluntary but unwarned statements. The Court did not question that the unwarned statement itself had to be excluded under *Miranda*, *id.* at 318, as it was in that case, *id.* at 302. But *Elstad* did not involve post-*Miranda* interrogation in which the suspect waived his rights and voluntarily responded to questions about his earlier silence upon being arrested and his failure to ask questions thereafter. This case, in contrast, does involve that issue. *Elstad* thus did not resolve the issue that the court of appeals confronted in this case.

In any event, any error in admitting the contested statements was harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U.S. 18 (1967). Whereas in *Velarde-Gomez*, *supra*, the government relied heavily on evidence of the defendant's silence and there was little other evidence of guilt, precisely the opposite is true here. Even excluding all references to petitioner's silence, the court found that the government had presented "sufficient circumstantial evidence to support the verdict in this case." Pet. App. 8a. Indeed, the evidence was far more than merely sufficient. The evidence about the suspicious circumstances of petitioner's transportation of the table and his own (warned) admission that he knew it contained drugs provided overwhelming evidence of guilt. Because petitioner could not benefit from a holding that the admission of the testimony about his post-arrest, pre-warning silence was erroneous, review of that question in this case is not warranted.

2. Petitioner also contends (Pet. 14-17) that the court of appeals' conclusion that petitioner had waived his *Miranda* rights by answering questions about his earlier silence conflicts with decisions of the Seventh and Ninth Circuits holding that a later waiver of *Miranda* rights does not cure the erroneous admission into evi-

dence of prior silence. Pet. 15-17 (discussing *Velarde-Gomez*, 269 F.3d at 1033-1034, and *Hernandez*, 948 F.2d at 322-324). That claim does not merit review.

In *Hernandez*, the prosecution elicited testimony from the arresting officer about the defendant's post-arrest, pre-*Miranda* silence, asking whether "at the time [the defendant] was placed under arrest, did he make any immediate response?" 948 F.2d at 322. The witness answered "No." *Ibid.* After concluding that the prosecutor's reference to defendant's pre-*Miranda* silence violated the defendant's Fifth Amendment rights, *id.* at 322-323, the court concluded that petitioner's subsequent waiver of his *Miranda* rights had no effect on the admissibility of post-arrest, pre-*Miranda* silence. *Ibid.* In *Velarde-Gomez*, the court of appeals agreed with *Hernandez*'s conclusion about the effect of a subsequent waiver of *Miranda* rights on the admission of post-arrest, pre-*Miranda* silence. 269 F.3d at 1033-1034.

In this case, however, the court of appeals expressly declined to consider whether it agreed with *Hernandez* and *Velarde-Gomez*. Pet. App. 14a n.3 (citing cases and stating that "[w]e do not address the issue of whether a *Miranda* waiver alone has any retroactive effect on the admissibility [of] post-arrest, pre-*Miranda* silence"). Rather, the court stated that its "holding today is a narrow one and relies exclusively on the fact that [petitioner] knowingly, intelligently, and voluntarily waived his *Miranda* rights and then proceeded to answer questions about his post-arrest, pre-and post-*Miranda* silence." Accordingly, there is no square conflict between

the decision in this case and the decisions petitioner cites.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner also contends (Pet. 18) that *United States* v. *Thierman*, 678 F.2d 1331 (9th Cir. 1982), conflicts with the court of appeals' conclusion that by answering the officers' questioning after receiving *Miranda* warnings, petitioner "waived his right to have the entire conversation, including the implicit references to his silence contained therein, used against him as substantive evidence of guilt." Pet. App. 13a. That is not correct. *Thierman* did not involve the government's use of a defendant's pre- or post-*Miranda* silence. Rather, that case merely observed that "[t]hrough the exercise of the option to terminate questioning, a suspect can control the subjects discussed, the time at which the questioning occurs, and the duration of the interrogation." 678 F.2d at 1335. Here, petitioner did not attempt to make a limited waiver of his *Miranda* rights.